



## DEPARTMENT OF DEFENSE

### Office of the Secretary

### 32 CFR Part 310

[Docket ID: DoD-2020-OS-0094]

RIN 0790-AL17

### Privacy Act of 1974; Implementation

**AGENCY:** Office of the Secretary of Defense (OSD), Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** The Department of Defense (DoD or Department) is issuing a final rule to amend its regulations to exempt portions of the DoD-0005, Defense Training Records system of records from certain provisions of the Privacy Act of 1974. Specifically, the rule exempts portions of the Defense Training Records system of records from certain provisions of the Privacy Act because of national security requirements and to preserve the objectivity and fairness of testing and examination material.

**DATES:** This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ms. Lyn Kirby,

OSD.DPCLTD@mail.mil, (703) 571-0070.

### SUPPLEMENTARY INFORMATION:

#### I. Background

On December 28, 2020 (85 FR 84316-84319), DoD published a notice of a new system of records (SORN) establishing the DoD-0005, Defense Training Records system of records. This system covers DoD's collection, use, and maintenance of records about training delivered to DoD Service members, civilian personnel, and other DoD-affiliated individuals. The training data includes enrollment and participation information,

information pertaining to class schedules, programs, and instructors, training trends and needs, testing and examination materials, and assessments of training efficacy. No comments on the Routine Uses were received during the SORN's 30-day public comment period.

## **II. Privacy Act Exemption**

The Privacy Act permits Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records and accountings of disclosures of such records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption.

Because this system of records may contain classified information or information the release of which could compromise the fairness or objectivity of the testing or examination process, DoD proposed to exempt this system of records from certain provisions of the Privacy Act by a notice of proposed rulemaking (NPRM) published at 85 FR 84278-84279 concurrently with the SORN. The NPRM proposed to modify DoD's Privacy Act regulations at 32 CFR part 310 to exempt portions of records maintained in DoD-0005 from the requirements of 5 U.S.C. 552a(c)(3) and (d)(1)-(4) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1) and (k)(6) of the Privacy Act. The public comment period ended on February 26, 2021, and DoD did not receive any comments on the NPRM. This final rule adds to the DoD's Privacy Act exemptions for Department-wide systems of records found in 32 CFR 310.13. Records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record.

## **Regulatory Analysis**

## **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

It has been previously determined that Privacy Act rules for the DoD are not significant rules. The rules do not: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

### **Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), it has been determined that Privacy Act rules for the DoD are not major rules, as defined by 5 U.S.C. 804(2).

### **Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”**

It has been determined that the Privacy Act rules for the DoD do not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rules will not significantly or uniquely affect small governments.

### **Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)**

The Director of Administration and Management certified that Privacy Act rules for the DoD do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the DoD.

### **Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been determined that Privacy Act rules for the DoD impose no additional reporting or recordkeeping requirements on the public under the Paperwork Reduction Act of 1995.

**Executive Order 13132, “Federalism”**

It has been determined that the Privacy Act rules for the DoD do not have federalism implications. The rules do not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

**Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”**

It has been determined that Privacy Act rules for the DoD do not have substantial effects on Indian tribal governments. The rules do not impose substantial direct compliance costs on one or more Indian tribes, preempt tribal law, or effect the distribution of power and responsibilities between the Federal Government and Indian tribes.

**List of Subjects in 32 CFR Part 310**

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

**PART 310—[AMENDED]**

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.13 is amended by adding paragraph (e)(4) to read as follows:

**§ 310.13 Exemptions for DoD-wide systems.**

\* \* \* \* \*

(e) \* \* \*

(4) *System identifier and name.* DoD-0005, “Defense Training Records.”

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (d)(1), (2), (3), and (4).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (6).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)–(I) Exemption (k)(1).* Training records in this system of records may contain information concerning DoD personnel or training materials that is properly classified pursuant to executive order. Application of exemption (k)(1) for such records may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(2) *Exemption (k)(6).* Training records in this system of records may contain information relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) for such records may be necessary when access to and amendment of the records, or release of the accounting of disclosure for such records, may compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring testing and examinations to be continuously re-administered.

(B) *Subsections (d)(3) and (4).* These subsections are inapplicable to the extent an exemption is claimed from subsection (d)(2). Moreover, applying the amendment appeal procedures to training and examination materials could impose a highly impractical administrative burden by requiring testing and examinations to be continuously re-administered.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt

records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

\* \* \* \* \*

Dated: September 14, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021-20221 Filed: 9/17/2021 8:45 am; Publication Date: 9/20/2021]